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SUPREME COURT, U.S.

NO. 78-5072

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

ORIGINAL COPY

SHIRLEY DAVIS, Petitioner

v.

OTTO E. PASSMAN, Respondent

SUPPLEMENT TO RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

October, 1978

A. Richard Gear
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Attorney for Respondent

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Respondent, Otto E. Passman, pursuant to Rule 24(5) of the Rules of the Supreme Court of the United States, hereby files this Supplement to Response in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in order to bring to the attention of the Court a new development which is relevant to its deliberations with respect to the Petition for Certiorari.

Senate Resolution 431 [Report No. 95-729] was attached to that Response as Appendix F. This resolution provides for an internal procedure for processing discrimination complaints based upon race, color, religion, sex, national origin, age, or state of physical handicap. Remedies provided therein include hiring, reemployment, payment of specified sums, and promotions. In addition to this demonstrable evidence that the Senate is attending to its own alleged employment problems without interference by the judiciary, a very recent development demonstrates that the House of Representatives is also proceeding to enact a binding procedure for processing and remedying complaints of prohibited discrimination.

On September 25, 1978, House Resolution 1380 (H. Res. 1380) attached hereto as Appendix G, was submitted to the House of Representatives. As can be seen, the resolution is called the "Fair Employment Relations Resolution" and establishes a House Fair Employment Relations Board, a House Fair Employment Relations Office, and detailed binding procedures for hearing and settling complaints of discrimination. It creates remedies of hiring, reemployment, payment of specified sums and promotions. The Fair Employment Relations Resolution implements, inter alia, clause 9 of Rule XLIII of the internal Rules of the House of Representatives[1] which was adopted on January 14, 1975[2] and states as follows:

> "9. A Member, officer, or employee of the House of Representatives shall not discharge or refuse to hire any individual, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

Respondent presents this development for the consideration of the Court to further emphasize that the Congress is solving whatever employee relations problems may exist within its halls without the assistance or interference of the judiciary. It is respectfully submitted that Congress be permitted to continue to pursue its own solutions.

Based upon the reasons set forth in the Response in Opposition and this Supplement, Respondent urges that certiorari be denied.

Respectfully submitted,

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By: A. Richard Gear
A. Richard Gear

[1] 94th Congress Second Session, House Document No. 94-663; Constitution, Jefferson's Manual and Rules of the House of Representatives of the United States at 674.

[2] Congressional Record, January 14, 1975, at 22. The date of adoption was approximately 6 months after the July 31, 1974, termination of Plaintiff Davis.

APPENDIX G

95TH CONGRESS
2D SESSION

H. RES. 1380

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 25, 1978

Mrs. SCHROEDER submitted the following resolution; which was referred jointly to the Committees on House Administration and Rules

RESOLUTION

Resolved, That this resolution may be cited as the "Fair Employment Relations Resolution".

PURPOSE

SEC. 2. It is the purpose of this resolution to implement clause 9 of rule XLIII and clause 6(a)(3)(A) of rule XI of the Rules of the House of Representatives, by establishing a House Fair Employment Relations Board, a House Fair Employment Relations Office, and procedures for hearing and settling complaints alleging violations of clause 9 of rule XLIII and clause 6(a)(3)(A) of rule XI of the Rules of the

House of Representatives by Members, officers, and employees of the House.

DEFINITIONS

SEC. 3. For purposes of this resolution, the term—

(1) "Board" means the House Fair Employment Relations Board established by section 101;

(2) "Office" means the House Fair Employment Relations Office established by section 201;

(3) "Director" means the Director of the House Fair Employment Relations Office established by section 201;

(4) "employee of the House" means any individual who is an employee of the House, or is treated as an employee of the House, for purposes of the Code of Official Conduct of the House of Representatives;

(5) "complainant" means an employee of the House or other individual who applies for a position in the House and who files a complaint under section 302;

(6) "respondent" means a Member, officer, or employee of the House against whom a complaint is filed under section 302;

(7) "Member" means a Representative in Congress, a Delegate to Congress, or the Resident Commissioner from Puerto Rico; and

(8) "office of the House" includes the office of a Member;

(9) "clause 9 of rule XLIII or clause 6(a)(3)(A) of rule XI" refer to clause 9 of rule XLIII or clause 6(a)(3)(A) of rule XI of the Rules of the House of Representatives.

TITLE I--FAIR EMPLOYMENT RELATIONS BOARD

ESTABLISHMENT

SEC. 101. (a) There is established an office of the House to be known as the House Fair Employment Relations Board. The Board shall consist of six members, selected from among individuals in the private sector, who have a demonstrated commitment to fair employment relations—

(1) three of whom shall be appointed by, and may be removed by, the Speaker of the House; and

(2) three of whom shall be appointed by, and may be removed by, the minority leader of the House.

No individual who has served as a Member, officer, or employee of the Senate or the House of Representatives or as an officer or employee of the Congress may be appointed as a member of the Board during the three-year period following the termination of his or her service as such a Member, officer, or employee.

(b) Each member of the Board shall be appointed for a term of four years commencing with the day after the expiration of the term of his or her predecessor, except that of the members first appointed—

(1) one member appointed by the Speaker and one member appointed by the minority leader (as designated at the time of appointment) shall be appointed for a term of two years commencing on the day on which this resolution is agreed to; and

(2) two members appointed by the Speaker and two members appointed by the minority leader (as designated at the time of appointment) shall be appointed for a term of four years commencing on such day.

Any member appointed to fill a vacancy occurring prior to the expiration of a term shall be appointed only for the unexpired portion of such term. Any member serving at the expiration of a term may continue to serve until his or her successor is appointed.

(c) The Board shall elect one of its members to serve as Chairperson.

(d) A quorum of the Board shall consist of four members, but no action of the Board in performing the functions and duties specified in paragraphs (1) and (3) of section 104(a) or in appointing or removing the Director under section 201 may be taken except with the concurrence of a majority of the members holding office.

(e) The Board is authorized to delegate to the Chairperson or any other member of the Board the authority to approve on behalf of the Board those actions of the Director which require approval of the Board under sections 201, 202, and 203.

COMPENSATION

SEC. 102. Each member of the Board shall receive compensation equal to the daily equivalent of the salary of the Clerk of the House for each day on which the member is engaged in performing his or her duties as a member of the Board and in traveling from or to his or her home to attend meetings of the Board. Each member shall also be entitled to reimbursement for transportation costs and actual travel expenses while so traveling in the same amounts as are payable to employees of the House.

MEETINGS; ADMINISTRATIVE SERVICES

SEC. 103. (a) The Board shall meet at least once every three months and shall also meet upon call of the Chairperson or of a majority of the members holding office. Notice of any meeting of the Board shall be given to all members at least three days prior to such meeting.

(b) All necessary administrative services required by the Board shall be furnished by the Office.

FUNCTIONS AND DUTIES

SEC. 104. (a) It shall be the function and duty of the Board—

(1) to establish and publish policies and guidelines for the implementation and enforcement of clause 9 of rule XLIII and clause 6(a)(3)(A) of rule XI;

(2) to supervise the actions of the Director and the operations of the Office through the Director; and

(3) to hear and determine complaints alleging violations of clause 9 of rule XLIII and clause 6(a)(3)(A) of rule XI in accordance with title III.

(b) In order to carry out its functions and duties under title III, the Board is authorized to appoint and fix the compensation (subject to applicable limitations imposed by or pursuant to law on the salaries of employees of the Senate) of such number of hearing examiners as may be necessary. Any such hearing examiner may be appointed on a temporary (not to exceed one year) or intermittent basis and any hearing examiner so appointed may be paid, for each day on which he or she performs services, not in excess of the daily equivalent of the highest salary which may be paid to a hearing examiner appointed on a permanent basis.

(c) The Board may adopt such regulations as it determines necessary to carry out its duties and functions.

PAYMENT OF EXPENSES

SEC. 105. The expenses of the Board (including compensation of members of the Board and hearing examiners) shall be paid from the contingent fund of the House of Representatives pursuant to appropriations made to the contingent fund for such purpose. Until funds are first so appropriated, such salaries and expenses shall be paid from the contingent fund out of funds appropriated for "Miscellaneous Items". Such salaries and expenses shall be paid out of the contingent fund upon vouchers approved by the Chairperson, except that vouchers shall not be required for the disbursement of salaries of employees paid at an annual rate.

TITLE II—HOUSE FAIR EMPLOYMENT RELATIONS OFFICE

ESTABLISHMENT

SEC. 201. (a) There is established an office of the House to be known as the House Fair Employment Relations Office. The Office shall be headed by a Director who shall be appointed by, and shall serve at the pleasure of, the Board. The Director shall receive compensation at an annual rate fixed by the Board, but not in excess of the highest rate of basic pay, as in effect from time to time, of level V of the Executive Schedule in section 5316 of title 5, United States Code.

(b) The Director, with the approval of the Board, shall appoint and fix the compensation (subject to applicable salary limitations imposed by or pursuant to law on the salaries of employees of the House) of such personnel as may be necessary to carry out the duties and functions of the Office. All personnel of the Office shall be appointed without regard to political affiliation and solely on the basis of their fitness to perform their duties.

(c) In carrying out the functions and duties of the Office, the Director, with the approval of the Board, may procure the temporary (not to exceed one year) or intermittent services of experts or consultants or organizations thereof by contract as independent contractors, or, in the case of individual experts or consultants, by employment at rates of pay not in excess of the daily equivalent of the highest rate of compensation which may be paid to employees of the Office appointed on a permanent basis.

(d) The Director may prescribe the duties and responsibilities of the personnel of the Office, and delegate to them authority to perform any of the functions and duties imposed on the Office or on the Director, with the exception of the submission of reports under sections 302 (b) and (c).

FUNCTIONS AND DUTIES

SEC. 202. (a) In addition to the functions and duties imposed on it by title III, the Office shall (1) develop proce-

dures to implement the policies and guidelines of the Board to encourage full compliance with clause 9 of rule XLIII and clause 6(a)(3)(A) of rule XI by all Members, officers, and employees of the House and (2) perform such other functions as may be prescribed by the Board.

(b) The Office shall gather and maintain information with respect to each category of employees and individuals who are afforded equal employment opportunity by clause 9 of rule XLIII or clause 6(a)(3)(A) of rule XI, including, to the extent possible, information relating to individuals who apply for positions on the staffs of committees and offices of the House. The Office shall also gather and maintain information with respect to the employment practices of committees and offices of the House. Each year the Director, with the approval of the Board, shall submit to the House a report with respect to the information gathered under this subsection. Each report after the first report shall contain a comparison and evaluation of the data contained in such report with the data contained in prior reports.

(c) Upon the request of any committee or office of the House, the Office shall submit to such committee or office its recommendations for improvements in the employment practices of such committee or office. The Office shall assist the placement office with the development of procedures to collect and disseminate applications submitted by individuals

from categories which are afforded equal employment opportunity by clause 9 of rule XLIII or clause 6(a)(3)(A) of rule XI.

(d) The Office shall review the procedures and practices for receiving, hearing, and settling complaints of alleged violations of clause 9 of rule XLIII or clause 6(a)(3)(A) of rule XI under title III and make recommendations regarding the continuation or improvement of such procedures. Not later than January 3, 1981, the Director, with the approval of the Board, shall submit to the House the results of such review, together with his or her recommendations. Such report shall be referred to the appropriate committee or committees of the House which, within one hundred and eighty days after the date of referral, shall submit their recommendations on the report to the House.

SUPPLIES; PAYMENT OF EXPENSES

SEC. 203. (a) The Director is authorized to procure such books, stationery, and other supplies as may be necessary for the proper performance of the functions and duties of the Office. The Architect of the Capitol and the Sergeant at Arms of the House of Representatives shall furnish the Office such furniture and office equipment as may be necessary.

(b) The expenses of the Office (including salaries) shall be paid from the contingent fund of the House of Representatives pursuant to appropriations made to the contingent fund

for such purpose. Until funds are first so appropriated, such salaries and expenses shall be paid from the contingent fund out of funds appropriated for "Miscellaneous Items". Such salaries and expenses shall be paid out of the contingent fund upon vouchers signed by the Director, and approved by the Board, except that vouchers shall not be required for the disbursement of salaries of employees paid at an annual rate.

TITLE III—COMPLAINTS OF VIOLATIONS OF EQUAL EMPLOYMENT OPPORTUNITY

PART A—COUNSELING AND CONCILIATION

COUNSELING AND ASSISTANCE

SEC. 301. (a) Any employee of the House, or other individual who applies for a position in the House, who believes that he or she is being or has been discriminated against in violation of clause 9 of rule XLIII or clause 6(a)(3)(A) of rule XI may make a request to the Office for counseling and assistance. The Director shall designate employees of the Office to serve as counselors. Counselors shall advise employees and other individuals as to their rights under clause 9 of rule XLIII or clause 6(a)(3)(A) and furnish such other advice and assistance as may be requested with respect to the application of clause 9 of rule XLIII or clause 6(a)(3)(A) of rule XI. No written statement shall be required for an employee or other individual to receive counseling and assistance under this section.

(b) Counseling under this section must be requested within sixty days of the action giving rise to the alleged discrimination, unless the Director authorizes counseling after such sixty-day period or unless the alleged discrimination is based upon a continuing practice or policy.

INFORMAL COMPLAINTS AND CONCILIATION

SEC. 302. (a) Any employee of the House, or other individual who applies for a position in the House, who believes that he or she is being or has been discriminated against in violation of clause 9 of rule XLIII or clause 6(a)(3)(A) of rule XI may, within twenty days after counseling is requested under section 301, file an informal complaint with the Director. Such an informal complaint may be filed only against an individual whom the complainant believes actually participated in the alleged violation or the individual who has authority to remedy the alleged violation, or both. Such an informal complaint shall consist of a brief written statement of the alleged violation. The Director shall furnish a copy of such informal complaint to the respondent and, if the respondent is an officer or employee, shall furnish a copy of such informal complaint to the respondent's employer.

(b) Upon the filing of an informal complaint under subsection (a), the Director shall collect information concerning the alleged violation. Within forty-five days after the date of filing, the Director shall submit a report to the Board with

respect to such informal complaint and shall furnish copies of such report to the complainant and respondent and, if the respondent is an officer or employee, shall furnish a copy of such report to the respondent's employer.

(c)(1) If as a result of the information collected under subsection (b), the Director determines that there is no reason to believe that a violation of clause 9 of rule XLIII or clause 6(a)(3)(A) of rule XI may have occurred, he or she shall so state in the report submitted pursuant to such subsection, together with his or her reasons for such determination.

(2) If as a result of the information collected under subsection (b), the Director determines that there is reason to believe a violation of clause 9 of rule XLIII or clause 6(a)(3)(A) of rule XI may have occurred, he or she shall attempt to resolve such violation by informal means. If an informal agreement between the complainant and respondent is reached, the Director shall so state in the report submitted pursuant to such subsection. If an informal agreement between the complainant and the respondent is not reached, the Director shall include his or her findings in the report submitted pursuant to such subsection.

PART B—FORMAL COMPLAINTS AND HEARINGS

FILING OF FORMAL COMPLAINTS

SEC. 311. (a) If the report of the Director under section 302 with respect to an informal complaint sets forth the Director's determination that there is reason to believe that a violation of clause 9 of rule XLIII or clause 6(a)(3)(A) of rule XI may have occurred but no agreement has been reached between the complainant and the respondent, then the complainant may, within thirty days after the date on which such report is submitted to the Board, file a formal complaint with the Board. A formal complaint shall be under oath and shall be in such form and set forth the basis of the complaint in such detail as the Board may prescribe by rule or regulation.

(b) If the report of the Director under section 302 sets forth the Director's determination that there is no reason to believe that a violation of clause 9 or rule XLIII or clause 6(a)(3)(A) of rule XI may have occurred, the complainant may request the Board to review such determination. Such request shall be in writing and shall be made within thirty days after the date on which such report is submitted to the Board. The Board shall complete its review within thirty days after such request is made and if it determines that there is reason to believe that a violation of clause 9 or rule XLIII or clause 6(a)(3)(A) of rule XI may have occurred, the complainant may, within thirty days after the date of the

Board's determination, file a formal complaint under subsection (a).

HEARINGS

SEC. 312. (a) Each complaint filed under section 311 shall be assigned by the Board (or by such individual as the Board may designate) for a hearing by a hearing examiner appointed under section 104(b). The hearing examiner shall cause a copy of the complaint to be served on the respondent and, if the respondent is an officer or employee, shall furnish a copy of the complaint to the respondent's employer. The respondent shall be entitled to file, within ten days after such service, or within such longer time as the Board may permit, a formal answer to such complaint. A formal answer shall be under oath and shall be in such form as the Board may prescribe by rule or regulation.

(b) The hearing on a complaint shall be conducted expeditiously with a record in transcript form. Upon conclusion of the hearing, the hearing examiner shall submit to the Board a report containing his or her findings and recommendations (if any) for remedial action.

DECISIONS BY THE BOARD

SEC. 313. (a) The Board shall review the transcript and the findings and recommendations of the hearing examiner with respect to each complaint filed under section 311. If the Board finds that the hearing is incomplete, it may remand the

case to the hearing examiner. The Board shall render a decision in each case within sixty days after the filing of the formal complaint, unless prior thereto the complainant and the respondent reach an agreement disposing of such case.

(b) If the Board determines in any case that there is or has been a violation of clause 9 or rule XLIII or clause 6(a)(3)(A) of rule XI, its decision shall include an order for such remedial action as it determines appropriate, except that no remedy may be ordered which the Board determines would result in undue benefit or undue hardship to the complainant or the respondent.

RULES; PROCEDURE

SEC. 314. The Board shall prescribe such rules or regulations as it determines proper to carry out the provisions of this part, including rules or regulations relating to the conduct of hearings and proceedings under this part and the rights and privileges of complainants and respondents in such hearings and proceedings. The Board shall publish all rules and regulations which it proposed to prescribe under this section and shall give interested persons an opportunity to comment thereon.

PART C—APPEALS TO COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT

APPEALS

SEC. 321. (a) A complainant or respondent who is aggrieved by a decision or order of the Board under section 313 may, within thirty days after the decision or order is issued, appeal the decision or order to the Committee on Standards of Official Conduct.

(b) Within sixty days after an appeal is filed under subsection (a), the Committee on Standards of Official Conduct shall render its decision with respect to such appeal. Such decision may affirm the decision or order of the Board, reverse such decision or order in whole or in part, or remand the case to the Board for further proceedings. In any case in which the committee reverses a decision or order of the Board in whole or in part, if the committee determines that there is or has been a violation of clause 9 of rule XLIII or clause 6(a)(3)(A) of rule XI, it may order such remedial action as it determines appropriate, except that no remedy may be ordered which the committee determines would result in undue benefit or undue hardship to the complainant or the respondent.

PROCEDURE

SEC. 322. The Committee on Standards of Official Conduct shall prescribe such rules or regulations as it determines proper to carry out the provisions of section 321.

PART D—MISCELLANEOUS

REMEDIES

SEC. 331. (a) The remedial actions which may be specified in an order issued by the Board under section 313 or by the Committee on Standards of Official Conduct under section 321 include, but are not limited to—

(1) if the discrimination is failure or refusal to hire an individual, a requirement that such individual be employed within a specified period of time, or the payment of a specified sum to such individual, or both;

(2) if the discrimination is discharging an individual, a requirement that such individual be reemployed within a specified period of time, or the payment of a specified sum to such individual, or both;

(3) if the discrimination is with respect to the promotion or compensation of an individual, a requirement that such individual be promoted to or compensated at a specified level within a specified period of time, or the payment of a specified sum to such individual, or both; and

(4) if the discrimination is with respect to terms, conditions, or privileges of employment of an individual, a requirement that such terms, conditions, or privileges be changed within a specified period of time, or the payment of a specified sum to such individual, or both.

(b) Any payment ordered to be made to an individual under an order issued by the Board or the Committee on Standards of Official Conduct shall be made out of the contingent fund of the House upon a voucher signed by the Chairperson of the Board or the chairman of the committee, as the case may be.

(c) No complainant or witness in a proceeding under this title shall be subject to any reprisal, interference, intimidation, or coercion by any Member, officer, or employee of the House as a result of filing such complaint or appearing as such a witness.

RECORDS; CONFIDENTIALITY OF INFORMATION

SEC. 332. (a) The records, files, and papers relating to each informal complaint filed under section 302, each formal complaint filed under section 311, and each appeal taken under section 321 shall constitute papers of the House and shall be retained for at least five years. All such information, including the existence of a case, shall be maintained on a confidential basis, and, except as provided in subsection (b) or

as otherwise ordered by the House, such information shall not be disclosed to any person (other than the complainant and the respondent) and shall not be available for inspection other than by the Board, the Director and employees of the Office, and, with respect to any appeal taken under section 321, the Committee on Standards of Official Conduct.

(b) Decisions and orders of the Board under section 313 and decisions and orders of the Committee on Standards of Official Conduct under section 321 shall be made public.

COOPERATION BY COMMITTEES AND OFFICES

SEC. 333. Each committee and office of the House shall cooperate with the Board, the Office, and the Committee on Standards of Official Conduct in order that the functions and duties imposed on them by this resolution may be properly and effectively carried out.

95TH CONGRESS
2D SESSION

H. RES. 1380

RESOLUTION

To implement clause 9 of rule XLIII and clause 6(a)(3)(A) of rule XI of the Rules of the House of Representatives, relating to employment practices.

By Mrs. SCHROEDER

SEPTEMBER 25, 1978

Referred jointly to the Committees on House Administration and Rules